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IN THE

SUPREME COURT OF THE UNITED STATES

....., Term 19....

No. 697

WILSON JENKINS,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT AS TO JURISDICTION

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No.....

WILSON JENKINS,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From The United States Court Of Appeals For The Fifth Circuit

_____

STATEMENT AS TO JURISDICTION

The Appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on an appeal to review the judgment of the United States Court of Appeals for the Fifth Circuit under USC Sec. 1254(2) and should exercise such jurisdiction in this case

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia, announced on May 2, 1956, is reported in 141 Fed. Supp. 499. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court which was announced on November 2, 1956, has not yet been reported. These opinions are appended to this statement as Appendix A.

JURISDICTION

This proceeding was a scire facias action to revive an allegedly dormant fine judgment of $10,000 imposed Nov. 18, 1932 for conspiring to violate the National Prohibition Act, no longer in force, filed on October 3, 1955 in the United States District Court for the Southern District of Georgia.

The judgment of the District Court granting summary judgment in favor of respondent (R. 42) was entered on May 2, 1956, and a copy thereof is appended to this statement as Appendix A. The petitioner filed a Notice of Appeal to the United States Circuit Court of Appeals for the Fifth Circuit on May 18, 1956 (R. 60).

The Court of Appeals handed down an opinion on November 2, 1956, (R. 70) affirming the judgment of the District Court, which opinion and judgment is hereby prayed to be reviewed. The Notice of Appeal to the United States Supreme Court was filed in the United States Circuit Court of Appeals for the Fifth Circuit on November 27, 1956.

It is respectfully submitted that USC Sec. 1254(2) confers jurisdiction on this Court. The Statute which

the United States District Court for the Southern District of Georgia and the United States Court of Appeals for the Fifth Circuit have declared in conflict with the laws of the United States is:

"Code of Georgia, Section 110-1001. **Dormancy of judgments.** A judgment shall become dormant and shall not be enforced:

1. When seven years shall elapse after the rendition of the judgment before execution is issued thereon and entered on the general execution docket of the county wherein such judgment was rendered; or

2. Unless entry is made on the execution by an officer authorized to levy and return the same and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or

3. Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the courts is made and due written notice of such effort, specifying the time of the institution of the suit or proceedings, the nature thereof, the names of the parties thereto and the name of the court in which it is pending, is filed by the plaintiff in execution or his attorney at law with the clerk and entered by said clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in Paragraph 2.

The record of the execution made as prescribed in Paragraph 1 of this section, or of every entry as prescribed in Paragraph 2 or in Paragraph 3 shall in-

stitute a new seven-year period within which the judgment shall not become dormant: Provided, that when an entry is filed for record more than seven years from the date of the execution, the execution shall be recorded with all entries thereon, but if filed within seven years, the entry shall be recorded on the original record of the execution.

It shall not be necessary in order to prevent dormancy that such execution be entered or such entry recorded on any other docket.

Georgia Code. Section 110-1002. **Revival of dormant judgment.** A dormant judgment may be revived by scire facias or sued on within three years from the time it becomes dormant.

QUESTIONS PRESENTED

1. Is the Georgia Statute of Limitations on dormancy and revival of judgments invalid as repugnant to Federal Law and not binding on the Federal Government in view of the fact that the United States placed the execution on the execution docket of the Superior Court of Chatham County, Georgia and voluntarily submitted the judgment and the execution thereon to the Georgia law pertaining to dormancy and revival of judgments, which Georgia law now bars revival of the judgment?

2. Is Appellant entitled to credit for 12 days additional punishment served above the 30 days required by law for indigent defendants? As a conflict of fact exists in this regard, does summary judgment deprive Appellant of his property without due process of law in contravention of the 5th, 8th, and 14 Amendments to the United States Constitution?

3. Does the fact that the 21st Amendment to the United States Constitution repeals the 18th Amendment and the National Prohibition Act for violation of which appellant was convicted, prevent a new judgment on the fine against the appellant?

4. Is the allowance of the instant scire facias proceeding in which the District Court based its decision partly on the nature of the proceeding contrary to applicable Federal Law, Federal Rules of Civil Procedure, Rule 81B?

5. Irrespective of whether the Government may still revive the judgment by scire facias on the judgment, will it be without any method of enforcement of a judgment rendered thereon under Rule 69(a), 28 USCA, requiring the execution on any judgment in conformity with the state law which makes no provision for such a situation?

6. Is such action precluded by Title 28, Paragraph 2462 of USCA providing limitations on suits for the enforcement of civil fines, penalties and forfeitures?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which are relevant to decision in this case, and the pertinent text of which is set forth in Appendix B hereto, are Amendments V (p. 102, USCA, Constitution), VIII (p. 408, USCA, Constitution), XIV (p. 2, USCA, Constitution), XVIII (p. 1012, USCA, Constitution) and XXI (p. 1038, USCA, Constitution) of the United States Constitution; Georgia Statutes which are Georgia Code 110-1001 and 110-1002 Federal Statutes, Title

28, Rule 69, USCA (p. 414), Title 18, USCA, Paragraph 3569 (p. 368).

STATEMENT OF THE CASE

On March 26, 1932, Petitioner, Wilson Jenkins, was charged with violation of the National Prohibition Act and on November 18, 1932, was sentenced to pay a fine of $10,000 and serve two years. Petitioner served the two years and not only the thirty days required for release for one making a pauper's affidavit, but forty-two days (R. 8, 9, 10, 40, 57, 58). There is a conflict of fact as to the additional time served over the thirty days required for release, the Government contending defendant was awaiting transportation for two days as implied in Affidavit of W. W. Steele (R. 36, 38, 39), and the Government is silent as to the period from March 1, 1933, to March 12, 1933, as to why defendant was not released upon the end of the thirty day period required for non-payment of a fine for one taking a pauper's oath on March 1, 1933.

On December 5, 1933, thirty-six states having ratified the 21st Amendment, the 18th Amendment ceased to be in effect and with it fell the National Prohibition Act for which Petitioner was fined for conspiracy to violate said act, and which fine was revived by the District Court on May 2, 1956. The execution on the original judgment of November 18, 1932, was recorded on the general execution docket of the Superior Court of Chatham County, Georgia, and laid there dormant since June 11, 1944, the last entry nulla bona having been made June 11, 1937. Under Georgia law a judgment can become dormant if no entry is made within a seven year period on the execution docket (Georgia Code 110-1001) supra and it can only be revived by

Scire Facias with three years after it becomes dormant (Georgia Code 110-1002).

A scire facias petition was filed by the United States on September 7, 1955, seeking to revive the judgment of November 18, 1932, ~~although~~ and the District Court for the Southern District of Georgia handed down a judgment reviving the 1932 judgment on May 2, 1956. This judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on November 2, 1956. These opinions are attached to this statement as Appendix A.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

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The Circuit Court of Appeals has decided a question which has not been but should be decided by this court in holding that the Federal Government is not bound by a State Statute of Limitations on the revival of judgments even when it submits its rights to state law by placing the judgment on the state execution docket and allowing it to remain there until it became dead under state law. The point of view of the District and Circuit Courts is made less tenable by Rule 69(a), USCA, and Georgia Code 110-1001, 1002 (Appendix B). In no case has such a set of facts involving an execution placed upon the State Court execution docket and allowed to remain there for a time making such judgment dead under State law been passed upon by the United States Supreme Court.

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It is inescapable that the public interest requires review of the constitutional questions involved in this

case. The National Prohibition Act went out of effect with the repeal of the 18th Amendment and it is petitioner's contention that at this late date a new judgment, in effect, a new fine based on the now unconstitutional law can not be had. In **United States v. Bailey** (52 F2 287) the United States Circuit Court of Appeals for the Fifth Circuit interpreting USCA, Title 18, Sec. 569 (now USCA, Title 18, Sec. 3563; which is substantially the same) sustained appellant's position that said action is not a civil action but is criminal in its nature. In **United States v Chambers**, 291, US 217, 89a 616, 1510; **U. S. ex rel Voorhees v. Hill**, 6 F. Supp. 922 and **United States v. Sautter**, 17 F. Supp. 326, it was stated that after the repeal of the Eighteenth Amendment of the United States Constitution an original sentence imposed for violation of the National Prohibition Act can not be changed, or amended, and a new sentence can not be imposed in lieu of the original one.

But even if the instant case is considered a civil case under Title 28, Paragraph 2462 of USCA, the action is barred. If it is considered as a criminal case, the act upon which it is based is now no longer in effect and such a criminal judgment can not now be amended or a new judgment imposed.

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Public interest and the protection of individual rights requires the review by this court of the fact that petitioner has filed affidavits asserting he was held for twelve days after taking a pauper's oath and that he was not "awaiting transportation" for two of those days as the Government contends (R. 58). Under 28 USCA, 18-3569 (Appendix B) after 30 days con-

finement for non-payment of a fine upon taking the pauper's oath petitioner was entitled to be discharged. If petitioner was held against his will (R. 58) he should be given credit on the fine for the additional time served. At any rate if there is any conflict in the record, the District Court should not have granted Summary Judgment to Appellee (R. 36, 38, 39, 58, 59). Appellant made an affidavit, which was ignored by the District Court, that he was held against his will in the Federal Penitentiary when he should have been released under law (see R. 58, 59).

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The District Court and the Court of Appeals have departed from the usual course of judicial proceedings in allowing a scire facias action which action is in the opinion of the District Court one of the basis upon which revival is allowed (see United States v. Jenkins, 141 Fed. Supp. 499; R. 42), in view of Rule 81(b), Federal Rules of Civil Procedure, which state, "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the procedure prescribed in these rules."

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1254(2), Title 28, United States Code.

Respectfully submitted,

BOUHAN, LAWRENCE, WILLIAMS & LEVY

By Geo. J. Bouhan

APPENDIX A.

Decision and Order on Motion for Summary Judgment by Plaintiff and Judgment of the Court.

United States District Court for the Southern District of Georgia, Savannah Division.

United States of America, Plaintiff,

v. Civil No. 822.

Wilson Jenkins, Defendant

Scire Facias Suit to Revive Dormant Judgment.

Statement of the Case.

A motion for summary judgment by plaintiff in the above-styled case has been considered by the Court after oral arguments by both parties and after consideration of briefs submitted by both parties on the points in question.

It appears that the captioned action was brought by the plaintiff on September 7, 1955, to revive a dormant judgment against the defendant, who was sentenced in this Court on November 18, 1932, for violations of the National Prohibition Act. The defendant at that time was duly sentenced to serve a term of two years in the United States Penitentiary and pay a fine of $10,000.00, the defendant to stand committed until said fine was paid or until otherwise discharged by Law.

The defendant served his minimum sentence under law, plus some forty-two days, inasmuch as the $10,000.00 fine was not paid. The defendant certified that he was a pauper and was unable to pay said fine, and after serving the statutory thirty days in addition to

the sentence applied for discharge under the provisions of Section 1042, Revised Statutes of the United States. Based on the forma pauperis petition the defendant was released from the custody of the Attorney General.

Execution was subsequently issued on said fine judgment and was recorded on the General Execution Docket in the office of the Clerk of the Superior Court of Chatham County, Georgia, on June 11, 1937. The judgment referred to has lain dormant since June 11, 1944.

The defendant filed a timely motion to dismiss the Government's action to revive the judgment based on the above fine alleging that the action is barred by the provisions of Title 28, Rule 69, of the United States Code, which states in part:

> "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the District Court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

The defendant in his motion pointed out that Georgia Code, Section 110-1002, requires that a dormant judgment be sued on within three years of the time it becomes dormant, and, therefore, alleged that the Government's action was barred.

The defendant after filing his original motion to dismiss filed an amended motion to dismiss by leave of the Court which restated the grounds in the original motion and raised the additional point that the de-

fendant served forty-five days according to defendant's affidavit attached to the amendment in addition to his two years sentence in lieu of the fine of $10,000.00, and that he has, therefore, satisfied whatever fine was due by his confinement to the penitentiary for forty-five days.

After defendant filed his amended motion to dismiss the defendant filed a document entitled "Supplementary Brief of Defendant," which was accepted as an additional amendment to the defendant's motion to dismiss in so far as it raised for the first time the point that the Scire Facias suit by plaintiff to revive the dormant judgment in question cannot now be obtained since the Prohibition Act ceased to be in effect by virtue of the ratification of the 21st Amendment prior to the filing of the suit to revive a dormant judgment based on a criminal fine imposed for violating the Act.

The Court on January 9, 1956, denied the defendant's motion to dismiss, as amended and supplemented, after due consideration of briefs filed by both parties, and, accordingly an order was entered on January 10, 1956, determining each and every point raised by the defendant.

On January 18, 1956, a timely answer was filed by defendant admitting that the defendant was fined $10,000.00 as alleged in the plaintiff's suit and that the fine has not been paid. However, the defendant denies liability at this time and by way of affirmative defense restates the same grounds raised in his prior motion to dismiss, as amended and supplemented, and separately listed as affirmative defense two of the arguments previously employed in his briefs to support the motion to dismiss, namely, that a scire facias pro-

ceeding is a supplementary action, and not an original action, on the judgment barred by State law, and as such is precluded by State law, and that irrespective of whether the Government may still revive the judgment by scire facias on the judgment it still will be without any method of enforcement of a judgment rendered thereon because of Rule 69 (a), 28 U. S. C. A., the issuance of any execution thereon would necessarily have to be in conformity with the State law which makes no provision for such a situation.

The plaintiff, on January 25, 1956, moved this Court for a summary judgment after filing proper notice in accordance with provisions of Rule 56 of the Federal Rules of Civil Procedure on the ground that the pleadings and rulings of this Court, which were attached as exhibits, show that the defendant has admitted the facts upon which the plaintiff's suit is based and that each and every defense pleaded in defendant's answer had been denied by this Court in ruling upon defendant's motion to dismiss. Thereafter the defendant filed an objection to plaintiff taking summary judgment restating once again the defenses previously raised in his answer. The defendant then amended his objection to plaintiff taking summary judgment by raising a constitutional question on the point previously raised by him that the fine is not collectible because he served forty-five days in addition to his two years sentence by stating that since no allowance was made for the fifteen days he was imprisoned over the thirty days, as required by law, a judgment for the fine at this time would be an excessive fine in violation of the Eighth Amendment of the United States Constitution, and that such a judgment would deprive him of his property without due process of law in contravention of the Fifth Amendment of the United States

Contsitution and in contravention of the Fourteenth Amendment of the United States Constitution, in that the judgment would have to be enforced by execution through the State Court and this amendment would prohibit action in the State Court on such a judgment since it provides that no State shall enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of his property without due process of law.

Thereafter the plaintiff, by leave of Court and pursuant to Rule 56 (e) of the Federal Rules of Civil Procedure, supplemented its motion for summary judgment by filing an affidavit executed by the present warden of the institution where the defendant was confined affirming that the minimum expiration date of the defendant's sentence was January 31, 1935, and that on March 2, 1935, the defendant would have served a total of 30 days for nonpayment of fine as required by law. The affidavit further states that the United States Commissioner directed that the defendant be discharged from further imprisonment on the 12th day of March, 1935, and that the defendant was discharged on March 14, 1935, after transportation had been secured. The affidavit was supported by a photostat of a verified notice to the United States Commissioner for the district that the defendant would make application for discharge on March 3, 1935, under Section 1042, Revised Statutes of the United States, and a photostat of a certificate of Discharge of Poor Convict, dated March 12, 1935, ordering the defendant to be discharged on March 12, 1935.

The defendant, by leave of Court, then amended all of his pleadings to acknowledge that he was released

from imprisonment in March, 1935, after serving forty-two (42) days subsequent to the minimum expiration date of his two (2) year sentence.

Conclusions of Law

This Court is of the opinion that the plantiff's motion for summary judgment should be sustained for the reasons stated in the opinion rendered in the order denying defendant's motion to dismiss which shall be reiterated herein, and for the reason that the defendant's latest approach to the points previously raised does not alter the Court's opinion that they are without merit as will be shown in the conclusions of law herein.

In regard to the allegations that the instant action is barred by the provisions of Title 110, Section 1002 of the Georgia Code, it is well settled that a statute of limitations does not run against the Government unless such a statute has been specifically enacted by Congress to bar suit by the Government in a particular type case. See Guaranty Trust Co. v. United States (1938), 304 U. S. 125, 132-135; United States v. Mack (1935), 295 U. S. 480, 489; Grand Trunk Western Railway Co. v. United States (1920), 252 U. S. 112, 121; Davis v. Corona Coal Co. (1924), 265 U. S. 219, 222; Chesapeake & Delaware Coal Co. v. United States (1919), 250 U. S. 123, 125; Society Suisse v. Cummings, 99F. (2nd) 387 395; United States v. Nashville, etc., Railway Co. (1886), 118 U. S. 120, 125. That very question which is at issue in the instant case was decided in the case of United States v. Houston et al., 48 Fed. 207-210. The Court in discussing this point ruled that a State statute requiring that actions against executors and administrators shall be commenced within

three years from the time of notice of appointment and giving bond, otherwise the claim shall be forever barred does not affect the right of the United States to revive a judgment against the executor, citing the case of United States v. Nashville, etc., Railway Co., supra, where the Court held:

> ". . . the United States, asserting rights vested in them as a sovereign government are not bound by any statute of limitation, unless Congress has clearly manifested its intention that they should be so bound."

This principle was followed by the Fifth Circuit Court of Appeals in the decision rendered in the case of United States v. Noojin, 155 Fed. 377.

It is also well settled that the United States is not bound by State statutes of limitation or subject to the defense of laches in the enforcement of its rights. United States v. Summerlin, 310 U. S. 414.

The State statute that the defendant attempts to invoke does not bar substantive action by the United States.

The Supreme Court of the United States in Pierce et al. v. United States, 255 U. S. 398, held that:

> ". . . judgment for penalties may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. The statute applies to all judgments for penalties, whether recovered by civil or criminal proceedings."

The Supreme Court in the case of Custer v. McCutcheon, 283 U. S. 514-519, held that:

> "The Plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution (on the old judgment) in the form provided by state law." (Parenthetical insertion added.)

Thus the question has been conclusively settled by the Supreme Court concerning whether the United States may bring an action upon a dormant judgment inconsistent with the limitations of State statute. The defendant argues that the Court should not consider the McCutcheon case as well as the other cases cited by the Government and relied upon by this Court in reaching this decision, inasmuch as "There were insufficient facts given in the report of the cases to disclose whether the execution on the judgment had been entered on the State Execution Docket so as to subject the same to State law pertaining to dead judgments." This conclusion on the part of the defendant as to when the Federal Government becomes subject to the State law is clearly erroneous. The Georgia Law as set out in Georgia Code Section 110-1001 states that a judgment becomes dormant seven years after rendition of judgment, not seven years after filing of the execution. Therefore, even if the execution was not filed in the instant case, or in any other case, State or Federal, the judgment in Georgia would become dormant within seven years after its rendition. In any event, Georgia law governing the procedure of filing of execution certainly does not control the procedure in the States wherein the cited cases were decided.

The salient point is that it has been decided that the United States retains its right of action in those States even where there are statutes barring action on dormant judgments or limitations on a right of action. In

the McCutcheon case obviously there was an attempt to record an execution on a dormant judgment and State law prohibited the procedure after the judgment had become dormant, however, as stated, the remedy, as in the instant case, was to revive the old judgment. The Federal Government is controlled by State statute governing the procedure for filing and acting upon executions whether the procedure is actually followed or not. That is to say, State law determines when a Federal judgment becomes dormant, but not the substantive right of revival. The fact that the Scire Facias proceedings is a supplementary action does not preclude the revival action here since the action on the dormant judgment is substantive, not procedural.

This premise has been organized in all cases involving this particular point. The Court in the case of Smith v. United States, 143 F. 2d 228, certiorari denied 323 U. S. 727, held:

> "The local Rule of District Court relating to executions, exemptions, judgment liens and the like, and making state practice applicable thereto, deals only and under what circumstances a penal judgment may be enforced by the United States."

The Court in deciding the case of Miller v. United States, 160 F. 2d 608, also held:

> "Rule 69 of the Federal Rules, supra, makes applicable the California law only as to the remedies of execution and other proceedings 'in aid of a judgment.' We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action is a substantive right in the United States. Not its procedural remedy."

The McCutcheon and Miller cases, supra, were followed in a recent Federal Court case entitled Juneau Spruce Corporation v. International Longshoremen's & Warehousemen's Union et al., 128 Sup. 697-705, decided March 1, 1955, when the Court held as follows:

> "A writ of execution is not part of the judgment itself and must be distinguished from it. Accord: National Discount Corp. v. O'Nell, 6 Cir., 1952, 194 F. 2d 452, and F. H. A. Burr, 1940, 309 U. S. 242, 251, 60 S. Ct. 488, 84 L. Ed. 724. It is a procedural device issued by a Court to assist a successful litigant in obtaining the benefits in the judgment awarded him. Its sole function is in enforcing the judgment of the Court. Provisions prescribing the time limits for execution are not statute of limitation on the judgment itself. Custer v. McCutcheon, 1931, 283 U. S. 514, 519, 51 S. Ct. 520, 75 L. Ed. 1238; Miller v. United States, 9 Cir., 1947, 160 F. 2d 608."

The District Court for the Eastern District of Michigan on January 11, 1955, in the case of United States v. Middler, 127 F. Supp. 686, also followed the above decision when it held that:

> "Provisions of United States statute that laws of State, except where Constitution or acts of Congress otherwise provide, shall be regarded as rules of decision in civil actions in United States courts, in cases where they apply, does not bind the United States, suing in one of its own Courts, to a state statute of limitations whether named in such statute or not. 28 U. S. C. A., Section 1652."

The defendant then maintained that "irrespective of whether the Government may still revive the judgment

by scire facias on the judgment it still will be without any method of enforcement of a judgment rendered thereon because by Rule 69 (a), 28 U. S. C. A., the issuance of any execution thereon would necessarily have to be in conformity with the State law which makes no provision for such a situation." The answer to this conclusion is obvious. The United States at the time it obtained judgment on a scire facias suit will simply record its judgment lien by filing execution with the Clerk of this Court and with the County Clerk. The scire facias judgment, although based on an action in continuation of the original judgment, is a new judgment and may be recorded as any other civil judgment. See Miller v. United States, supra. In any event, even should there not be a State remedy for filing an execution on the judgment obtained, and there is one here, the United States would not be precluded from bringing a substantive action and obtaining a judgment thereon.

In regard to defendant's contention that he served forty-two days instead of thirty-two days before being released for inability to pay the $10,000.00, and to impose a fine in addition to the alleged extra time served will constitute double punishment. Title 18, Section 3569, merely provides a method by which an indigent prisoner may be released for failure to pay a fine imposed upon him after he has served at least thirty days in addition to his original sentence. The section provides that when a poor convict has been confined in prison for thirty days solely for the nonpayment of said fine, then an application to the nearest United States Commissioner setting forth his inability to pay such fine will be considered, and if it shall appear to the Commissioner that such convict is unable to pay such fine the convict shall be discharged. In other words, a

convict shall stand committed after the thirty days either until he pays the fine or makes a pauper's oath before a United States Commissioner. This point has also been well settled. See Wagner et al. v. United States, 3 F. 2d 864, where the Court held:

> "Where a fine is imposed the Court may or may not imprison until the fine is paid, but if it does imprison the form of the sentence should be that the defendant be imprisoned until the fine is paid, or until he be otherwise discharged by due process of law."

The Court in the case of Grier v. Kennan, 64 F. 2d 605, held:

> "Where separate fine was imposed under both counts of indictment, and prisoner committed to county jail until payment of fine, prisoner, after imprisonment for thirty days, held entitled to discharge on satisfactory proof of inability to pay fine."

The Smith case, cited supra, also ruled on this very question by holding:

> "The statute providing for oath of a poor convict and the serving of an additional thirty days by one unable to pay fine imposed merely provides a method whereby an indigent convict may avoid further imprisonment upon a judgment committing him until fine imposed is paid, and does not affect the liability to pay such fine."

Therefore to require the defendant here to pay the $10,000.00 fine would not constitute double punishment. Since the defendant remained incarcerated for a period of twelve days in addition to the minimum thirty days period that he must stand committed in

the event he is a pauper, this Court must assume there being no evidence to the contrary, that the United States Commissioner did his duty by releasing the defendant from custody in accordance with the provisions of law, and that the elapse of the twelve days in question was necessary and proper. The defendant could not apply for discharge until after he served the thirty days and he could not be discharged until after a hearing before a United States Commissioner.

Therefore, it would, of course, be necessary for the Commissioner to assign a hearing date after the expiration of the said thirty days. The proceeding itself would necessitate making the release date subsequent to the minimum period that must be served for failure to pay the fine. However, should the defendant have a cause of action that he may be permitted to pursue against the Government, his relief would not lie in this action but in an original action against the Government.

The United States Constitution, Article 2, Section 2, provides that only the President may compromise a criminal judgment by granting reprieves and pardons for offenses against the United States. This subject is fully developed in nineteen opinions of the Attorney General, 344. Reference is also made to Title 18, Federal Rules of Criminal Procedure United States Code Annotated, Rule 35, which prohibits the Court from reducing a sentence after sixty days from the date of imposition of said sentence. The fine imposed has not been paid, hence the defendant has not fully satisfied the obligation that he owes society.

Concerning the defendant's allegation that the plaintiff's scire facias suit cannot now be obtained since the Prohibition Act has since been rendered inoperative,

the judgment sought by the plaintiff is a civil proceeding supplementary to and in aid of the original fine judgment which was constitutionally imposed and is not a criminal proceeding to impose a new sentence or a criminal proceeding sought to change the original sentence. In Collins County National Bank of McKinney, Texas v. Hughes, 152 Fed., pp. 414-415, the Court held that:

> "A proceeding by scire facias to revive a personal judgment is a mere continuance of the suit in which the judgment was rendered. It is a supplementary remedy to aid in the recovery of the debt evidenced by the judgment. It is not an original or an independent suit or proceeding."

The scire facias proceeding here is a proper civil proceeding to revive a final judgment validly imposed.

Inasmuch as it has been determined that the suit by the Government to revive the dormant judgment is permitted under the law and the incarceration of the defendant after the expiration of two years was pursuant to the sentence imposed and law, there is no valid basis upon which the defendant can invoke the Eighth, Fifth and Fourteenth Amendments of the Constitution relating to excessive fines and due process, nor will the State be prohibited from recording an execution on the new judgment.

Order on Motion and Judgment.

Wherefore, It Is Ordered, Adjudged and Decreed that the motion for summary judgment by the plaintiff be, and the same is, hereby sustained, that the judgment rendered against the defendant in this Court on November 18, 1932, in Criminal Action No. 5865 be,

and the same is hereby revived, and that judgment be entered in favor of plaintiff in the amount of $10,000.00, together with the cost of the action to revive.

This 2nd day of May, 1956.

(s) F. M. Scarlett,
United States Judge.

Presented by:
Joseph B. Bergen,
Assistant United States Attorney.

Filed May 9th, 1956.

Opinion of the United States Court of Appeals for the Fifth Circuit.

In the
United States Court of Appeals
for the Fifth Circuit.

No. 16181.

Wilson Jenkins,
Appellant,

versus

United States of America,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

(November 2, 1956.)

Before Hutcheson, Chief Judge, and Borah and Brown, Circuit Judges.

Per Curiam: Alleging: an indebtedness to the United States in the sum of $10,000 evidence by a judgment entered in the United States District Court for the Southern District of Georgia, imposing a fine of $10,000; that the judgment was dormant; and that no part of the sum due under it had been paid; plantiff sued to revive the judgment and to recover the $10,000.

The defendant admitted the entry of the judgment against him as pleaded by plantiff, and that he had not paid it. He, however, denied liability, putting forward five grounds: (1) that the revival of the judgment was

now barred: (2) that recovery upon it is precluded by State law; (3) that he had disharged the judgment by serving fifteen days in the penitentiary over and above the thirty days service required by law of indigent persons; (4) that, even if the plaintiff could obtain judgment, it could not, under controlling State law, obtain execution thereon; and (5) that the adoption of the Twenty-first Amendment has deprived the National Prohibition Act, for violation of which the fine was imposed and judgment entered, of authority and force, and there is no power in the courts to revive the old judgment or enter a new judgment based thereon.

On the issues thus joined, plaintiff moved for a summary judgment, and the district judge, in an opinion[1] making full findings of fact and conclusions of law, found for plaintiff, and entered judgment in its favor for $10,000 and costs.

Appealing from the judgment, the defendant, making the same contentions he made below, urges upon us that the findings and conclusions were wrong and the judgment must be reversed.

We cannot agree. On the contrary, we are of the clear opinion that, for the reasons advanced and upon the authorities cited by the district judge, to which may be added 7 Moore's Federal Practice, Sec. 69.04, pages 2412 to 2420, the judgment was right and must be AFFIRMED:

A True Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

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1 United States v. Jenkins 141 Fed. Supp. 499

APPENDIX B.

United States Constitution Amendments.

Amendment V (page 102, United States Code Annotated, Constitution): "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VIII (page 408, United States Code Annotated, Constitution): "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV (page 2, United States Code Annotated, Constitution): "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ."

Amendment XVIII (page 1012, United States Code Annotated, Constitution): "Section 1. After one year from the ratification of this article the manufacture,

sale, or transportation of intoxiating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. . . ."

Amendment XXI (page 1038, United States Code Annotated, Constitution): "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed . . . "

Title 18, U. S. C. A., par 3569 (p. 368, U. S. C. A.): "(a) When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States commissioner in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter.

"If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, exceeding $20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit.

So help me God.' Upon taking such oath such convict shall be discharged; and the commissioner shall file with the institution in which the convict is confined a certificate setting forth the facts. In case the convict is found by the commissioner to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; or if he finds that the retention by such convict of any part of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for nonpayment of such fine or fine and costs upon payment on account of his fine and costs, of that portion of his property in excess of the amount found to be reasonably necessary for his support or that of his family.

"(b) Any such indigent prisoner in a Federal institution may, in the first instance, make his application to the warden of such institution, who shall have all the powers of a United States Commisisoner in such matters, and upon proper showing in support of the application shall administer the oath required by subsection (a) of this section, discharge the prisoner, and file his certificate to that effect in the records of the institution.

"Any such indigent prisoner, to whom the warden shall fail or refuse to administer the oath may apply to the nearest Commissioner for the relief authorized by this section and the Commissioner shall proceed de novo to hear and determine the matter."

Title 28, Rule 69, U. S. C. A. (page 414, U. S.C. A.):

"(a) Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held. . . ."

Georgia Code 110-1001 (page 119, Supplement Ga. Code Ann.):

"A judgment shall become dormant and shall not be enforced:

"1. When seven years shall lapse after the rendition of the judgment before execution is issued thereon and entered on the general execution docket of the county wherein such judgment was rendered; or

"2. Unless entry is made on the execution by an officer authorized to levy and return the same and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or

"3. Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the

courts is made and due written notice of such effort, specifying the time of the institution of the suit or proceedings, the nature thereof, the names of the parties thereto and the name of the court in which it is pending, is filed by the plaintiff in execution or his attorney at law with the clerk and entered by said clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in paragraph 2.

"The record of the execution made as prescribed in paragraph 1 of this section, or of every entry as prescribed in paragraph 2 or in paragraph 3 shall institute a new seven-period within which the judgment shall not become dormant: Provided, that when an entry is filed for record more than seven years from the date of the execution, the execution shall be recorded with all entries thereon, but if filed within seven years the entry shall be recorded on the original record of the execution.

"It shall not be necessary in order to prevent dormancy that such execution be entered or such entry recorded on any other docket."

Georgia Code 110-1002 (page 269, Ga. Code Ann.):

A dormant judgment may be revived by scire facias or sued on within three years from the time it becomes dormant.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 697

WILSON JENKINS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE UNITED STATES TO DISMISS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia, Savannah Division (Statement 10–24) is reported at 141 F. Supp. 499. The opinion of the United States Court of Appeals for the Fifth Circuit (Statement 25–26) is reported at 238 F. 2d 83.

JURISDICTION

The judgment of the Court of Appeals (Statement 26) was entered on November 2, 1956. Notice of appeal was filed on November 27, 1956. Appellant professes to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (2) (Statement 2).[1]

[1] The Government argues *infra*, pp. 5–6, that jurisdiction by appeal under 28 U. S. C. 1254 (2) is lacking in this case.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal from a court of appeals under 28 U. S. C. 1254 (2) in a case where the court below did not invalidate a state statute but merely held it inapplicable to the proceeding before it.

2. Whether in the circumstances of this case the government was entitled to revive a criminal judgment for a fine imposed in 1932 and dormant since 1944.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

Sections 110–1001 and 110–1002 of the Georgia Code; Sections 1042 and 5296 of the Revised Statutes, 18 U. S. C. (1934 ed.) 641; 28 U. S. C. 2462; and Rules 69 (a), and 81 (b), Federal Rules of Civil Procedure, are set forth in the Appendix, *infra*, pp. 14–16.

STATEMENT

This action was brought by the United States in the District Court for the Southern District of Georgia to revive a dormant judgment for a fine. Wilson Jenkins had been sentenced on November 18, 1932, for violations of the National Prohibition Act, the sentence providing that the defendant was to serve a term of two years in the United States Penitentiary and pay a fine of $10,000, the defendant to stand committed until the fine was paid or until otherwise discharged by law (R. 3). The defendant served his minimum sentence under law plus thirty days, as provided by statute, on his failure to pay the fine (R. 40). At the expiration of his minimum sentence,

defendant applied to the United States Commissioner for discharge under the provisions of Section 1042, Revised Statutes (*infra,* pp. 15–16), which governed the discharge of convicts unable to pay their fines (R. 38–39). Twelve days later, on March 12, 1935, upon completion of the required statutory proceedings, the defendant was ordered released from the custody of the Attorney General on the basis of his pauper's petition (R. 39–40).

Execution was issued on the judgment for the fine on June 11, 1937, and was recorded on the General Execution Docket in the office of the Clerk of the Superior Court of Chatham County, Georgia (R. 2). An entry of *nulla bona* was made on the execution by the Deputy United States Marshal (R. 2). The judgment has lain dormant since June 11, 1944, and no portion of the fine has been paid (R. 2).

On September 7, 1955, the Government filed the present action in the District Court to revive the judgment for the fine (R. 1–2). The defendant filed a motion to dismiss, alleging that under Georgia law a judgment dormant for over three years could not be enforced, and that therefore this action was barred by Rule 69 (a), Federal Rules of Civil Procedure (*infra,* p. 16), which makes local execution procedures applicable (R. 7–8). It was further alleged that the time served in addition to the minimum sentence should be considered as being in lieu of the fine and that therefore the $10,000 fine had been satisfied (R. 9–10); and that the suit by the Government to revive the dormant judgment could not be entertained since the National Prohibition Act, for violation of which the fine was

imposed, ceased to be in effect when the Twenty-First Amendment to the Constitution was ratified in 1933 (R. 44–45). On January 9, 1956, defendant's motion to dismiss was denied (R. 16–25).

Defendant thereupon filed his answer, admitting the imposition of the fine and its nonpayment but denying liability on the grounds set forth in the motion to dismiss (R. 26–29). The answer alleged additionally that even if the judgment were revived the Government would still be without any method of enforcement since under Georgia law execution could not issue thereon (R. 28). The Government then moved for summary judgment (R. 25–26) and defendant responded, reasserting his defenses and adding that if no allowance were made for his additional imprisonment, judgment for the fine would be violative of the Fifth, Eighth and Fourteenth Amendments to the Constitution (R. 29–33).

The District Court granted the Government's motion for summary judgment (Statement 23–24). With respect to Georgia law on dormancy and execution, the court held that the United States retains its right of action upon a previously entered judgment notwithstanding a state statute barring enforcement of dormant judgments (Statement 15–17). The court stated that under Rule 69 (a), Federal Rules of Civil Procedure, the Government is controlled by state statutes governing the procedure for filing and acting upon executions, but that the substantive right of revival by bringing suit upon the judgment is not subject to state law and that an action for revival was maintainable in the district court (R. 17–19).

The court rejected defendant's contention that his imprisonment beyond his minimum sentence released him from liability for the $10,000 fine (Statement 20–22). The court also refused to accept defendant's allegation that the judgment could not be revived since the Prohibition Act became inoperative upon repeal (Statement 22).

On appeal, the Court of Appeals for the Fifth Circuit affirmed, *per curiam,* for the reasons given and on the authorities cited by the District Court (Statement 26).

ARGUMENT

1. Appellant seeks review by appeal, under 28 U. S. C. 1254 (2), of the Court of Appeals decision sustaining the Government's revival judgment. It is manifest at the outset that this appeal was improvidently taken since the court below has not held any state statute "to be invalid as repugnant to the Constitution, treaties or laws of the United States"—the jurisdictional prerequisite of that Code provision. Rather, it has affirmed a district court judgment which held that under applicable federal law a dormant judgment previously rendered in a United States district court is not subject to restrictions of local law relative to suits on judgments (Statement 16–20, 26). Absent the necessary jurisdictional foundation, this appeal must be dismissed. Cf. *Long Beach Federal Savings & Loan Assoc.* v. *Federal Home Loan Bank of San Francisco,* 351 U. S. 916, 922; *Colgate* v. *United States,* 280 U. S. 43; *Westling* v. *United States,* 288 U. S. 590; *Pub. Service Comm.* v. *Batesville Tel. Co.,* 284 U. S. 6; *Bradford Electric Co.* v. *Clapper,* 284 U. S. 221.

2. Even if this Court should determine that it has jurisdiction to treat the document filed by Jenkins as a petition for a writ of certiorari,[2] there is no basis for review since the decision of the courts below is plainly correct.

(*a*) Rule 69, Federal Rules of Civil Procedure provides that:

> (a) IN GENERAL. Process to enforce a judgment for the payment of money shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. * * *.

Undeniably, under this Rule, the Government is bound by state execution procedures when seeking to enforce a judgment rendered in a federal district court. Thus, in the present case, Section 110–1001 of the Georgia Code (*infra*, pp. 14–15), which governs execution procedure in that state, precludes the United States from obtaining execution to enforce the judgment entered against Jenkins on November 18, 1932, since that judgment has lain dormant since June 11, 1944.

---

[2] It should be noted that, while the Judicial Code provides that appeals which are improvidently taken from state court judgments are to be treated as petitions for writs of certiorari (28 U. S. C. 2103), there is no comparable Code provision for improvident appeals from court of appeals' decisions.

It is equally clear that the substantive right of the United States to sue upon that judgment in one of its own courts is not affected by state law. The terms of Rule 69 (a) embrace only state "procedure on execution" and do not encompass the separate and distinct matters of suit upon judgment and state statutes of limitation on such suits. Thus Section 110–1002 of the Georgia Code (*infra*, p. 15), which is a statute of limitations for suits on dormant judgments, clearly does not control actions such as the present one.

In *Custer* v. *McCutcheon*, 283 U. S. 514, this Court was faced with the question of the applicability of state execution limitations to a judgment which the United States sought to have enforced under a statute which was a forerunner of Rule 69 (a).[3] In holding that the time fixed by state statute within which execution must issue applied to the United States, this Court stated (283 U. S. at 519):

> This time limited for issuing executions is, strictly speaking, not a statute of limitations. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in

[3] The controlling federal statute in *Custer* v. *McCutcheon* was Section 916 of the Revised Statutes, which provided:

"The party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the State in which such court is held, or any such laws which may subsequently be enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such State laws as may be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise; * * *."

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> the course of a litigation after it is instituted. *The plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution in the form provided by state law.* [Emphasis added.]

This same distinction applies in construing Rule 69 (a). Thus, in *Miller* v. *United States,* 160 F. 2d 608 (C. A. 9), the Ninth Circuit held (160 F. 2d at 609):

> Rule 69 of the Federal Rules, *supra,* makes applicable the California law only as to the remedies of execution and other proceedings "in aid of a judgment." We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action. Such a cause of action is a substantive right in the United States, not its procedural remedy.

See also *Smith* v. *United States,* 143 F. 2d 288, 229 (C. A. 9), certiorari denied, 323 U. S. 729; *United States* v. *Middler,* 127 F. Supp. 686 (E. D. Mich.).

Accordingly, under both the language of Rule 69 (a) and the controlling decisions, whereas local law relative to procedure on execution applies to the United States, the independent substantive right of the Government to sue upon a prior judgment in its favor is not subject to state limitations.[4]

---

[4] Appellant's contention, that the Government's previous attempt to utilize state enforcement procedures in and of itself subjected the United States to local restrictions on revival of judgments, is patently untenable. Either Rule 69 (a) subjects the Government to state time restrictions on suits upon judgments, or it does not—and this obtains irrespective of prior utilization of local collection procedures.

(*b*) It is additionally contended that the Government may not sue to revive its judgment since Rule 81 (b) of the Federal Rules of Civil Procedure abolished the writ of *scire facias* and also that this action is precluded by 28 U. S. C. 2462 (Statement 8–9).

With respect to the former contention, it is true that the Government's district court action was labeled "Scire Facias on Judgment in Criminal Action No. 5865" (R. 1), and that Rule 81 (b) abolishes the writ of *scire facias*. However, the same rule provides that:

> Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

The United States, of course, may sue upon a judgment imposing a fine in a criminal cause as upon a money judgment obtained in a civil action. *Smith* v. *United States,* 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729. Accordingly, the Government's action, which set forth entry of prior judgment and nonpayment, and which prayed "for revival of judgment and judgment against the defendant, Wilson Jenkins, in the amount of $10,000 and costs" may be entertained either as a motion for revival or as a suit upon the prior judgment. Cf. *Reconstruction Finance Corp.* v. *Breeding,* 211 F. 2d 385 (C. A. 10); *Smith* v. *United States,* 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729; *Western Surety Co.* v. *United States,* 100 F. 2d 88, 93, (C. A. 9); *Paley* v. *Solomon,* 59 F. Supp. 887, 890 (D. D. C.); 7 Moore's *Federal Practice* (2nd ed.) 4446–4451.

As for 28 U. S. C. 2462,[5] which establishes a five-year limitation for commencement of actions to enforce a civil fine, penalty or forfeiture, it has properly been held that this limitation refers to the lapse of time between the commission of the offense for which the penalty was incurred and the original enforcement action, and imposes no time limit upon the enforcement of the penal judgment. *Smith* v. *United States*, 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729.

(*c*) Appellant's allegation that the fine judgment cannot be reviewed in view of the repeal of the Eighteenth Amendment, and the consequent demise of the National Prohibition Act, is equally devoid of merit. The present action is not a proceeding to impose a new sentence, nor does it seek to alter the original sentence. This is merely a proceeding directed toward collection of the original fine which was constitutionally imposed when the Eighteenth Amendment and the National Prohibition Act were in force. Repeal did not invalidate that portion of appellant's prison term which was to be served thereafter, nor did it invalidate the subsisting monetary debt to the Government. Cf. *United States ex rel. Randall* v. *United States Marshal for E. D. N. Y.*, 143 F. 2d 830 (C. A. 2); *United States ex rel. Nerbonne* v. *Hill*,

[5] 28 U. S. C. 2462 provides as follows:

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

70 F. 2d 1006 (C. A. 3), certiorari denied, 292 U. S. 634; *Odekirk* v. *Ryan*, 85 F. 2d 313 (C. A. 6); *United States ex rel. Cheramie* v. *Dutton*, 74 F. 2d 740 (C. A. 5), certiorari denied, *sub nom. United States ex rel. Cheramie* v. *Freudenstein*, 295 U. S. 733.[6]

(*d*) It is finally contended by appellant that he is entitled to forgiveness of his fine because of the twelve days served beyond the thirty-day period required before a convict may make application for release on the ground that he is unable to pay his fine. This claim is wholly untenable.

It should be noted initially that appellant's original claim in the District Court, that he was entitled to credit for the first thirty days of additional confinement, is refuted both by the statute and the interpreting decisions. Appellant's sentence for violation of the Prohibition Act was that he be imprisoned for two years, that he pay a fine of $10,000, and that he remain imprisoned until the fine should be paid or until otherwise discharged by law (R. 3). The statute (*infra*, pp. 15–16) provided, in substance, that a convict who is unable to pay such a fine shall stand committed for an additional thirty days, and that thereafter the nearest United States Commissioner will consider an application for release based upon in-

[6] The cases cited by appellant (Statement 8) in opposition to the foregoing are not inconsistent. They involve either prosecutions pending at the time of ratification of the Twenty-First Amendment (*United States* v. *Chambers*, 291 U. S. 217) or a change in a previous sentence after repeal (*United States* v. *Sautter*, 17 F. Supp. 326 (M. D. Pa.). This Court expressly stated in *Chambers* that it was not dealing with a case where final judgment was rendered prior to ratification, 291 U. S. at 226.

ability to pay. After completion of the appropriate statutory proceedings (*infra*, pp. 15–16) the Commissioner, if satisfied of the prisoner's inability to pay, and upon the prisoner's taking of a prescribed pauper's oath, shall order the convict's discharge (*infra*, pp. 15–16). In construing the obvious import of these statutory provisions, the Court of Appeals for the Ninth Circuit in *Smith* v. *United States*, 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729, stated (143 F. 2d at 229–230):

> The statute * * * merely provides a method whereby an indigent convict may avoid further imprisonment under a judgment committing him until the fine imposed is paid. The obligation to pay the fine is not thereby affected. *United States* v. *Pratt*, D. C., 23 F. 2d 333.

The additional imprisonment beyond the thirty-day term (Statement 8–9) does not prevent the revival of the judgment. The District Court noted that there were required statutory proceedings, with a consequent necessary time lapse after the minimum thirty-day period, before an indigent convict could be discharged. The court held that it must assume, there being no indication to the contrary, that the commissioner did his duty by releasing Jenkins from custody in accordance with the procedural provisions of the statute and that the additional twelve days were necessary and proper (Statement 21–22).[7]

---

[7] It is true that appellant was ordered discharged on March 12, 1935 (R. 39–40) and that he filed an affidavit in the District Court alleging that he was detained twenty-five hours and five minutes beyond that discharge date "against my will" (R. 59). This affidavit was in opposition to one filed by the warden of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
MARCUS A. ROWDEN,
Attorneys.

FEBRUARY 1957.

Medical Center for Federal Prisoners at Springfield, Missouri, stating that the additional time was to secure transportation (R. 37). However, even assuming this detention to be wrongful, the District Court had no jurisdiction to compromise the criminal judgment. See *Bozel* v. *United States*, 139 F. 2d 153, 156 (C. A. 6), certiorari denied, 321 U. S. 800.

APPENDIX

1. Sections 110–1001 and 110–1002 of the Georgia Code, provide as follows:

> 110–1001. *Dormancy of judgments.*—A judgment shall become dormant and shall not be enforced:
>
> 1. When seven years shall elapse after the rendition of the judgment before execution is issued thereon and entered on the general execution docket of the county wherein such judgment was rendered; or
>
> 2. Unless entry is made on the execution by an officer authorized to levy and return the same and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or
>
> 3. Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the courts is made and due written notice of such effort, specifying the time of the institution of the suit or proceedings, the nature thereof, the names of the parties thereto and the name of the court in which it is pending, is filed by the plaintiff in execution or his attorney at law with the clerk and entered by said clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in paragraph 2.
>
> The record of the execution made as prescribed in paragraph 1 of this section, or of every entry as prescribed in paragraph 2 or in paragraph 3 shall institute a new seven-year period within which the judgment shall not become dormant: Provided, that when an entry

is filed for record more than seven years from the date of the execution, the execution shall be recorded with all entries thereon, but if filed within seven years, the entry shall be recorded on the original record of the execution.

It shall not be necessary in order to prevent dormancy that such execution be entered or such entry recorded on any other docket.

110–1002. *Revival of dormant judgment.*—A dormant judgment may be revived by scire facias or sued on within three years from the time it becomes dormant.

2. Sections 1042 and 5296 of the Revised Statutes, 18 U. S. C. (1934 ed.) 641, provided:

SECTION 641. *Discharge of indigent convicts.* When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and costs, such convict may make application in writing to any United States Commissioner in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of $20, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way

disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts.

3. 28 U. S. C. 2462 provides as follows:

Time for commencing proceedings. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

4. Rule 69, Federal Rules of Civil Procedure, provides as follows in pertinent part:

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. * * *.

5. Rule 81, Federal Rules of Civil Procedure, provides as follows in pertinent part:

* * * (b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER, TERM 1956

No. 697

WILSON JENKINS
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

From The United States Court of Appeals for The Fifth Circuit.

BRIEF IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS

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BRIEF IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS

The Appellant, pursuant to United States Supreme Court Rule 16(3), files this his brief in opposition to Appellee's motion to dismiss his Statement As To Jurisdiction heretofore filed. The Motion to Dismiss of Appellee is based on the grounds:

1. The "appeal was improvidently taken since the court below has not held any State Statute 'to be invalid as repugnant to the Constitution, treaties or laws of the United States' ", (Appellee's Motion To Dismiss, p. 5).

2. "There is no basis for review since the decision of the courts below is plainly correct." (Appellee's Motion To Dismiss, p. 6).

(a) "Under both the language of Rule 69(a) and the controlling decisions, whereas local law relative to procedure on execution applies to the United States, the independent substantive right of the Government to sue upon a prior judgment in its favor is not subject to State limitations." (Appellee's Motion To Dismiss, p. 8).

(b) The Government's action in the District Court "may be entertained either as a motion for revival or as a suit upon a prior judgment" under Rule 81(b). (Appellee's Motion To Dismiss, p. 9).

(c) Repeal of the Eighteenth Amendment and the consequent demise of the National Prohibition Act did "not invalidate that portion of Appellant's prison term which was to be served thereafter, nor did it invalidate the subsisting monetary debt to the Government," (Appellee's Motion To Dismiss, p. 10).

(d) "The additional imprisonment beyond the thirty day term does not prevent the revival of the judgment," (Appellee's Motion To Dismiss, p. 11).

Opinions Below

The opinion of the United States District Court for the Southern District of Georgia, announced on May 2, 1956, is reported in 141 F. Supp. 499 (Jurisdictional Statement Appendix A, p. 10). The opinion of the United States Court of Appeals for

the Fifth Circuit affirming the judgment of the District Court is reported in 238 F. 2d 83 (Jurisdictional Statement Appendix A, p. 25).

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Jurisdiction

This proceeding was a scire facias action to revive an allegedly dormant fine judgment of $10,000 imposed November 18, 1932 for conspiring to violate the National Prohibition Act, no longer in force, filed on October 3, 1955 in the United States District Court for the Southern District of Georgia.

The judgment of the District Court granting summary judgment in favor of respondent (R.42) was entered on May 2, 1956, and a copy thereof is appended to the Statement As To Jurisdiction as Appendix A. The petitioner filed a Notice of Appeal to the United States Circuit Court of Appeals for the Fifth Circuit on May 18, 1956 (R. 60).

The Court of Appeals handed down an opinion on November 2, 1956, (R. 70) affirming the judgment of the District Court, which opinion and judgment is hereby prayed to be reviewed. The Notice of Appeal to the United States Supreme Court was filed in the United States Circuit Court of Appeals for the Fifth Circuit on November 27, 1956.

It is respectfully submitted that 28 U.S.C. 1254(2) confers jurisdiction on this Court. The Statute which the United States District Court for the Southern District of Georgia and the United States Court of Appeals for the Fifth Circuit have declared in conflict with the laws of the United States is:

"Code of Georgia, Section 110-1001. *Dormancy of judgments.* A judgment shall become dormant and shall not be enforced:

1. When seven years shall elapse after the rendition of the judgment before execution is issued thereon and entered on the general execution docket of the county wherein such judgment was rendered; or

2. Unless entry is made on the execution by an officer authorized to levy and return the same and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or

3. Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the courts is made and due written notice of such effort, specifying the time of the institution of the suit or proceedings, the nature thereof, the names of the parties thereto and the name of the court in which it is pending, is filed by the plaintiff in execution or his attorney at law with the clerk and entered by said clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in Paragraph 2.

The record of the execution made as prescribed in Paragraph 1 of this section, or of every entry as prescribed in Paragraph 2 or in Paragraph 3 shall institute a new seven-year

period within which the judgment shall not become dormant: Provided, that when an entry is filed for record more than seven years from the date of the execution, the execution shall be recorded with all entries thereon, but if filed within seven years, the entry shall be recorded on the original record of the execution.

It shall not be necessary in order to prevent dormancy that such execution be entered or such entry recorded on any other docket."

"Georgia Code. Section 110-1002. *Revival of dormant judgment.* A dormant judgment may be revived by scire facias or sued on within three years from the time it becomes dormant."

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Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which are relevant to decision in this case, and the pertinent text of which is set forth in Appendix B of the Statement As To Jurisdiction are Amendments V, VII, XIV, XVIII and XXI of the United States Constitution; Georgia Statutes which are Georgia Code 110-1001 and 110-1002; Federal Statutes, Rule 69(a), Federal Rules of Civil Procedure, 18 U.S.C., 3569.

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Questions Presented for Review

1. Whether this Court has jurisdiction of an appeal from a Court of Appeals under 28 U.S.C. 1254 (2) in a case where the Court below did not totally invalidate a State Statute but merely held it invalid as not applying to the Federal Government?

2. Whether in the circumstances of this case the Government was entitled to revive a criminal judgment for a fine imposed in 1932, dormant under State law which governs procedures in aid of a judgment since 1944, and dead since 1947?

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STATEMENT OF THE CASE

On March 26, 1932, Petitioner, Wilson Jenkins, was charged with violation of the National Prohibition Act and on November 18, 1932, was sentenced to pay a fine of $10,000 and serve two years. Petitioner served the two years and not only the thirty days required for release for one making a pauper's affidavit, but forty-two days (R. 8, 9, 10, 40, 57, 58). There is a conflict of fact as to the additional time served over the thirty days required for release, the Government contending defendant was awaiting transportation for two days as implied in Affidavit of W. W. Steele (R. 36, 38, 39), and the Government is silent as to the period from March 1, 1933, to March 12, 1933, as to why defendant was not released upon the end of the thirty day period required for non-payment of a fine for one taking a pauper's oath on March 1, 1933.

On December 5, 1933, thirty-six states having ratified the 21st Amendment, the 18th Amendment ceased to be in effect and with it fell the National Prohibition Act for which Petitioner was fined for conspiracy to violate said act, and which fine was revived by a new judgment by the District Court on May 2, 1956. The execution on the original judgment of November 18, 1932, was recorded on the general execution docket

of the Superior Court of Chatham County, Georgia, and laid there dormant since June 11, 1944, the last entry of nulla bona having been made June 11, 1937. Under Georgia law a judgment becomes dormant if no entry is made within a seven year period on the execution docket (Georgia Code 110-1001, supra.) and it can only be revived by scire facias within three years after it becomes dormant (Ga. Code 110-1002).

A scire facias petition was filed by the United States on September 7, 1955, seeking to revive the judgment of November 18, 1932, and the District Court for the Southern District of Georgia handed down a judgment reviving the 1932 judgment on May 2, 1956. This judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on November 2, 1956. These opinions are attached to the Statement As To Jurisdiction as Appendix A.

The Statement As To Jurisdiction was filed in the United States Supreme Court on January 17, 1957. A Motion To Dismiss on the grounds as stated in Pages 1 and 2 of this brief was filed by the United States in opposition to which this brief is directed.

ARGUMENT AND CITATION OF AUTHORITIES

1. The Motion to Dismiss filed by the Appellee asserts that this Court has no jurisdiction under 28 U.S.C. 1254 (2) in that the Court below has not held any State Statute ". . . to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." The Appellant maintains, however, that the Georgia Statute of limitations on judgments has been held invalid in so far as the Court below has held that it does not bind the Federal Government, as the Georgia law does not except the Federal Government from its provisions. (Ga. Code 110-1001, 2, supra, p. 4, 5). The state statute has certainly been declared invalid as repugnant to the laws of the United States in that the Georgia law as to judgments being dead after 10 years has been held not to apply to the United States. But even if the appeal is technically incorrect, which the Appellant does not concede, it is manifest under 28 U.S.C. 2103 that if the appeal were from a state court that the appeal could be treated as a petition for certiorari, and there is no reason for a different rule here.

Appellant respectfully requests that the same spirit as that of the Federal Rules of Civil Procedure govern the instant question so as to allow the case to be decided on its merits. (See Moore v. Illinois Cent. R. Co., 24 F. Supp. 731 S.D. Miss.)

None of the cases cited by the Appellee in support of the Motion to Dismiss on the grounds of this Court not having jurisdiction under 28 U.S.C. 1254 (2) involve a situation where a State law was held not to

be binding upon the United States as in the instant case. At any rate, Appellant respectfully asks this Honorable Court to postpone determining the jurisdictional question until Appellant can be heard as to the merits of his case.

2. It is contrary to law, equity and justice to allow a new criminal judgment to be rendered at this late date on the now unconstitutional Prohibition law.

(a) The Government is in the anomalous position of having to obtain a new judgment as the old one has become dead under State law which governs procedure supplementary to and in aid of a judgment under Rule 69(a) Federal Rules of Civil Procedure. (See Statement As To Jurisdiction, p. 30) *In Seibels v. Hodges*, 65 Ga. 245, the Georgia Court held that: ". . . Where ten years have elapsed from the date of the judgment, and no fi fa was issued, or if issued, no levy was made, and no steps taken as provided by law to revive the same, proceeding by scire facias is barred . . ." The Government is thus forced into having to obtain a new judgment upon its dead judgment. However even if this could legally be done, the Government admits in its Motion to Dismiss, page 6, that it is ". . . bound by State execution procedure when seeking to enforce a judgment rendered in a Federal District Court . . ." but the only manner in which the Government can enforce its new judgment is by State execution procedure under Rule 69 and State law prohibits such action. (Ga. Code 110-1001, 2, Supra.) Seibels v. Hodges, Supra.).

But irrespective of the execution difficulties which the Government finds it is involved in, the Govern-

ment has been forced to obtain a brand new judgment on the now unconstitutional Prohibition Act. It is apparent that such a proceeding is manifestly unjust irrespective of the procedural difficulties the Government finds itself in. In cases where it is manifestly unjust for the Government to take advantage of its laches the courts have refused to assent to such action.

In *The Falcon. The Powhattan.*, 19 F. 2d 1009, 1014 (D.C.D. Md.) the court said:

> "While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances . . ."

In *Walker v. United States*, 139 Fed. 409, 412 (C.C.M.C. Ala.) involving a suit by a Marshal to recover fees paid out, the court said:

> ". . . When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors . . ."

Also it is interesting to note that the Federal Government was held subject to the same exemptions as private persons in case of execution on judgments in *Clerk v. Allen*, 114 Fed. 374, 377 (D.C., W.D. Va.):

> ". . . Nothing can be more clear than this (referring to section 1042, Rev. St.) as a recognition by congress that in case of execution upon

judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases . . ."

(b) The entire record of the case, including the judgment of the District Court, is so permeated with a discussion of the nature of a "scire facias action" and is so predicated upon this constituting a "scire facias action" that the Government can hardly contend that the only defect in the proceeding lay in the case-style. (Statement As To Jurisdiction, p. 22, 23.)

(c) The Government in its Motion to Dismiss contends, referring to the 18th Amendment to the United States Constitution, that ". . . Repeal did not invalidate that portion of Appellant's prison term which was to be served thereafter, nor did it invalidate the subsisting monetary debt to the Government." (Motion to Dismiss of Appellee, p. 10)

In the case of *United States ex rel. Randall v. United States Marshal For Eastern District of New York*, 143 F. 2d 831 (C.A. 2), involving the repeal of the National Prohibition Act strongly relied on by the Appellee, the Court said: ". . . The commitment was a ministerial and not a judicial act which did not prevent the judgment from becoming final prior to the date of the repeal . . ." The Court thus intimated

that a different result would be arrived at if a new judgment was obtained.

Conceding for argument that the judgment is not vacated or the execution of the sentence is not arrested, still at this late date a new judgment reviving the old may not now be had. The difficulty of the Government's position is found in quoting the case of *Miller v. United States*, 160 F. 2d 608 (C.A. 9), (Motion By The United States To Dismiss, p. 8.) ". . . We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action . . ." In the Miller case and in no other case has the Government been able to cite a new judgment allowed to be taken on an unconstitutional law either in its briefs in the District Court or the Court of Appeals. *United States v. Middler*, 127 F. Supp. 686 (E.D. Mich.) strongly relied upon by Appellee involved draft evasion. *Smith v. United States*, 143 F. 2d 228 (C.A. 9) strongly relied upon by Appellee involved a violation of the Tariff Act of 1922.

In *Odekirk v. Ryan*, 85 F. 2d 314 (C.A. 6), strongly relied upon by Appellee in its Motion to Dismiss, the Court in passing on a commitment for conviction of violation of the Prohibition Act, prior to its repeal had this to say:

> ". . . Here the judgment was pronounced before the repeal of the law violated, the law being the authority for the judgment. A commitment is in no sense a new judgment but is a ministerial act done pursuant to a judgment. The authority for it, as indicated in the cases

> cited, is not the law violated but the judgment which the law authorized, and the judgment being valid, the commitment must stand or fall with it and is also valid, though effected after repeal of the law . . ."

This language also suggests that a different question would be presented if a new judgment rather than a simple ministerial action was necessary.

Appellant's argument is that on an unconstitutional law, revival proceedings may not be had at this date and that a new judgment cannot be obtained on the now unconstitutional law.

The Government is in the anomalous position of being unable to obtain a new judgment as through negligence it allowed the original one to become dead under State law and substantive revival cannot now be had under the instant proceeding as a new judgment cannot be obtained on the unconstitutional Prohibition Act.

In *United States v. Ionoff*, 8 F. Supp. 77, 78 (D.C.M.D. Pa.) the Court said:

> ". . . The sentence of June 8, 1933, did not impose a term of imprisonment. Without deciding whether said sentence of June 8, 1933, was a final judgment, this court cannot now for the first time impose a jail sentence for violation of the National Prohibition Act. If the said judgment was final, this court cannot now change or amend it, or impose a new sentence in lieu of that originally imposed. 36 Op. Attys. Gen. 186; U.S. v. Hill (D.C.) 6 F Supp 922,

affirmed August 8, 1934, 72 F. (2d) 826 (C.C.A. 3rd Circuit); U. S. v. Chambers, 291 U.S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A.L.R. 1510."

"If the judgment was not final, this court cannot now render a final judgment imposing a jail sentence. U. S. v. Chambers, supra . . ."

A fine judgment is not a debt to the sovereign as the Court stated in *United States v. Bailey et al*, 52 F. 2d 286, 287 (D.C.S.D. Ga.):

". . . Authority may be found that a fine or penalty expressed in a judgment is a debt to the sovereign and possibly some ill-considered statement may declare that it arises out of a 'common law case,' but manifestly Congress did not concur in such views . . ."

If there can be no change or amendment or new sentence judgment, how can there be a new fine judgment, the same thing precisely?

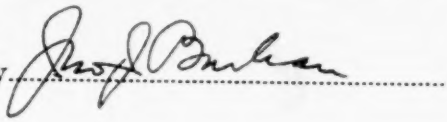
(d) Finally, Appellant respectfully contends that his affidavit states he was confined in the penitentiary for a period beyond the legal time of confinement, and his constitutional rights were abused. This may be an old forgotten, faraway happening but it is still fresh as far as his rights under the United States Constitution are concerned, and Appellant respectfully maintains if a conflict of fact exists in this regard, the District Court should not have granted summary judgment.

CONCLUSION

For the foregoing reasons and the fact that a new judgment rather than a ministerial act has been performed on an unconstitutional law, Appellant prays that Appellee's Motion to Dismiss be overruled.

Respectfully submitted,

BOUHAN, LAWRENCE, WILLIAMS & LEVY

By 

No. 697. JENKINS *v.* UNITED STATES. Appeal from the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *John J. Bouhan* for appellant. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 238 F. 2d 83.